

STATE OF WISCONSIN
Department of Commerce

In the Matter of the PECFA Appeal of-

Robert Witthuhn
Witthuhn Enterprises, Inc.
1724 Ridge Road
Green Bay,)Wisconsin 54304

PECFA Claim: 454304-4125-22
Hearing: #96-237

Final Decision

Preliminary Recitals

Pursuant to a Petition for Hearing filed July 3, 1996, under §101.02(6)(e) Wis. Stats., and §Comm/ILHR 47.53 Wis. Adm. Code, to review a decision of the Wisconsin Department of Commerce (Department), a hearing was commenced on August 11, 1999, at Madison, Wisconsin. A Proposed Hearing Officer Decision was issued on September 15, 1998, and the parties were provided a period of twenty (20) days to file objections.

The Issue(s) for determination are:

(1) Whether the Department's decision dated June 14, 1996, denying the Appellant's claim for reimbursement under the Petroleum Environmental Cleanup Fund Act ("PECFA) program in the amount of \$34,124.48 was incorrect, and (2) Whether the Department may administratively offset funds erroneously reimbursed against PECFA amounts otherwise owing to the Claimant/Appellant.

There appeared in this matter the following persons:

PARTIES IN INTEREST:

Robert Witthuhn
Witthuhn Enterprises, Inc.
1724 Ridge Road
Green Bay, Wisconsin 54304
In Person Appearance by Robert Witthuhn

Wisconsin Department of Commerce
PECFA Bureau
201 W. Washington Avenue
P.O. Box 7838
Madison, Wisconsin 53707-7838

By: Kelly Cochrane, Esq.
Assistant Legal Counsel
Wisconsin Department of Commerce
201 W. Washington Avenue, Room 322A
P.O. Box 7838
Madison, Wisconsin 53707-7838

The authority to issue a Final Decision in this matter has been delegated to the undersigned by the Secretary of the Department pursuant to §560.02(3) Wis. Stats.

The matter now being ready for Final Decision I hereby issue the following:

FINDINGS OF FACT

The Findings of Fact in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of this Final Decision.

CONCLUSIONS OF LAW

The Conclusions of Law in the Proposed Hearing Officer Decision cited above are hereby adopted for purposes of Final Decision.

DISCUSSION

The Discussion in the Proposed Hearing Officer Decision cited above is hereby adopted for purposes of Final Decision.

FINAL DECISION

The Proposed Hearing Officer Decision cited above is hereby adopted as the Final Decision of the Department.

NOTICE TO PARTIES

Request for Rehearing

This is a final agency decision under § 227.48 Wis. Stats. If you believe this decision is based on a mistake in the facts or law, you may request a new hearing. You may also ask for a new hearing if you -have found new evidence which would change the decision and which you could not have discovered sooner through due diligence. To ask for a new hearing, send a written request to Office of Legal Counsel, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

Send a copy of your request for a new hearing to all the other parties named in this Final Decision as "PARTIES IN INTEREST".

Your request must explain what mistake you believe the hearing examiner made and why it is important of you must describe your new evidence and tell why you did not have it available at the hearing in this matter. If you do not explain how your request for a new hearing is based on either a mistake of fact or law or the discovery of new evidence which could not have been discovered through due diligence on your part, your request for a new hearing will be denied.

Your request for a new hearing must be received by the Department's Office of Legal Counsel no later than twenty (20) days after the mailing date of this Final Decision as indicated below. Late requests cannot be reviewed or granted. The process for asking for a new hearing is set out in §227.49 Wis. Stats.

Petition For Judicial Review

Petitions for judicial review must be filed not more than thirty (30) days after the mailing of this Final Decision as indicated below (or thirty (30) days after the denial of a denial of a request for a rehearing, if you ask for one). The petition for judicial review must be served on the Secretary, Office of the Secretary, Wisconsin Department of Commerce, 201 West Washington Avenue, P.O. Box 7970, Madison, Wisconsin 53707-7970.

The petition for judicial review must also be served on the other "PARTIES IN INTEREST" or each party's attorney of record. The process for judicial review is described in §227.53 Wis. Stats.

Dated: 6/22/00

Martha Kerner
Executive Assistant
Wisconsin Department of Commerce
201 West Washington Avenue
P.O. Box 7970
Madison, Wisconsin 53707-7970

Copies to:

Above identified "PARTIES IN INTEREST", or their legal counsel if represented.

Joyce Howe, Office Manager
Unemployment Insurance Hearing Office
1801 Aberg Avenue, Suite A
Madison, Wisconsin 53707-7975

Date Mailed: 6/22/00

Mailed By: Henrietta Pattersen

STATE OF WISCONSIN
BEFORE THE
DEPARTMENT OF COMMERCE

**ROBERT WITTHUHN,
WITTHURN ENTERPRISES, INC.**
1724 S. Ridge Rd.
Green Bay, WI 54304

Appellants,

vs.

Hearing No. 96-237

WISCONSIN DEPARTMENT OF COMMERCE

PECFA CLAIM # 54304-4125-22

Respondent.

PROPOSED DECISION

This is a timely appeal by the appellants pursuant to section 101.02(6)(e), and Chapter ILHR 47.51(1) of the Wisconsin Administrative Code of a Department of Industry, Labor and Human Relations order dated June 14, 1996 denying appellants' claim for reimbursement under the Petroleum Environmental Cleanup Fund Act (PECFA) program in the amount of \$34,124.48.

Evidentiary hearing was held on September 15, 1998 before Administrative Law Judge Robert C. Junceau of the Department of Workforce Development (formerly the Department of Industry, Labor and Human Relations), State Hearing Officer for the Department of Commerce which, while this matter was pending, assumed responsibility for the PECFA program. The issues were orally argued at hearing and supplemented by letter briefs after the hearing.

The appellants appeared by William Robert Vachon, Representative, Green Bay, Wisconsin.

The respondent appeared by Attorney Kelly Cochrane, Assistant Legal Counsel, Wisconsin Department of Commerce, Madison, Wisconsin.

Parties in interest are:

Robert Witthuhn
Witthuhn Enterprises, Inc.
1724 S. Ridge Rd.
Green Bay, WI 54304

Wisconsin Department of Commerce
Environmental Regulatory Services Division
201 East Washington Avenue
P.O. Box 7969
Madison, WI 53707-7969

ISSUES

The issues for decision on appeal are (1) whether the department's decision dated June 14, 1996, denying the appellants' claim for reimbursement under the Petroleum Environmental Cleanup Fund Act ("PECFA") program in the amount of \$34,124.48 was incorrect and (2) whether the department may administratively offset funds erroneously reimbursed against PECFA amounts otherwise owing to claimant.

PROPOSED FINDINGS OF FACT

1. Throughout the time material to this case, appellants operated a gas station known as "Bob's Stadium Citgo" in Green Bay, Wisconsin.
2. Due to renovation and upgrade of the gas station, petroleum tank closure was required. Three tanks were scheduled for removal. A consultant for the appellants, Robert E. Lee & Associates, Inc., identified petroleum contaminated soil during a tank closure assessment conducted on July 14, 1993. During the excavation for the installation of the new tanks, 520 cubic yards of petroleum contaminated soil was excavated and stockpiled and covered with plastic on site, pending disposal options.
3. Appellants' consultant recommended that the stockpiled petroleum contaminated soil be remediated by thermal treatment which, due to the levels of contamination and site conditions, was the most cost effective of the suitable remedial alternatives.
4. In 1993 McKeefry & Sons Trucking, Inc., of Pulaski, Wisconsin loaded and transported approximately 520 cubic yards of petroleum contaminated soil from the gas station to Appleton, Wisconsin, where Clean Soils, Inc., thermally treated it to remove petroleum contamination. The Wisconsin Department of Natural Resources approved the treated soil to be disposed of as general fill. Appellants' consultant searched for a disposal site.
5. The treated soil was not needed as backfill at the gas station because the excavation from which it was removed now accommodated new petroleum gas tanks.
6. In 1994, appellants located a suitable site for disposal and paid Steve Schenian Trucking of Whitelaw, WI to haul the cleaned soil for disposal at a third site located in the vicinity of the Forest Assembly Ground southeast of Appleton.
7. Appellants filed a claim for PECFA reimbursement in the total amount of \$74,183.11. On June 14, 1996 the department denied \$34,124.48 of the claim stating that the costs

were incurred for non pre-approved remediation, accomplished to accommodate new construction.

8. Prior to the issuance of this proposed decision, the parties signed a written stipulation of settlement regarding the major portion of the disallowed claim of \$34,124.48, under which the department agreed to reimburse appellants for certain specified costs in the additional amount of \$25,977-75. A Dismissal Decision dated October 29, 1998 reflecting the decision was issued. Pursuant to a February 4, 1999 Order by Brenda J. Blanchard, Secretary, Wisconsin Department of Commerce, the October 29, 1998 Dismissal Decision was withdrawn because it was erroneous. Therefore, a revised Dismissal Decision was ordered. The revised Dismissal Decision has been issued under date of November 12, 1999.
9. The only issue remaining for proposed decision is the appellants' eligibility for reimbursement for invoice #4487 from Steve Schenian Trucking in the amount of \$2,663.60 for the cost of transporting the non-contaminated soil after thermal treatment in Appleton to the site of final disposal. Invoiced charges were as follows: \$100.00 for mobilization of crew and equipment, \$624.00 for excavating 520 yards of soil (\$1.20 per yard), and \$1,939.60 for trucking noncontaminated soil 520 yards (@ \$3.73).
10. The department initially reimbursed appellant for the costs of invoice #4487. However, in auditing the claim on appeal, the department auditor determined that the costs were erroneously reimbursed, apparently due to oversight of the fact that the soil had been treated before hauled for disposal.
11. The department's policy is to reimburse costs incurred through the remediation of soils process. In accordance with that policy, hauling for treatment to clean the soils is reimbursed. Once the soil is cleaned, however, it is not regarded as a threat to anyone. Therefore, the department does not pay for hauling it, with one exception: The department may approve reimbursement for additional hauling if the cleaned soils are used as backfill on the cleanup site to replace the contaminated soil removed. This is so even though the cost of doing that may exceed the cost of disposing of the soil at another site. In 99% of the cases when excavation is done, the party puts back something to level the site area. If the department pays for compacting and trucking the soils, it does not want to pay twice for handling it.
12. The department does not reimburse all costs even if the Department of Natural Resources allows them.
13. Department policy is to apply the administrative rules in force when a remediation contract is signed.
14. Appellants first argue that Chapter ILHR 47 of the Wisconsin Administrative Code authorizes reimbursement for costs associated with the treatment and *disposal* of contaminated soil, and that this would include hauling to a cleaning facility and disposal at any suitable location. Second, appellants argue that the department has no authority to

recover costs already awarded, except under §ILHR 47.14, Wis. Adm. Code, by asking the Attorney General to take appropriate action.

15. The department argues, first, that costs not associated with remediation are ineligible under §DILHR 47.30(2)(a)15 or (1993) §DILHR 47.30(2)(a)13; second, that it is authorized to recover from a claimant funds which have been improperly paid or paid for ineligible costs under *Kathleen Rick*, Hearing No. 96-152; and, third, that §ILHR 47.14 pertains only to matters where actions lie in a circuit court, not in an administrative hearing.

APPLICABLE LAW

At the time applicable to this claim sections DILHR 47.30(1)(c)4 and (2)(a)13. of the Wisconsin Administrative Code (1993) provided:

ILHR 47.30 ELIGIBLE COST ITEMS FOR REMEDIATION.

(1) **ELIGIBLE COSTS.** Eligible costs for an award issued under this chapter may be determined by the department based upon cost guidelines published by the department. Costs related to the following categories may be reimbursed under the scope of this chapter:

* * * *

(c) Costs associated with excavation and disposal of contaminated soils:

* * * *

4. Treatment and disposal of contaminated soils including DNR approved procedures for bio-remediation.

* * * *

(2) **EXCLUSIONS FROM ELIGIBLE COSTS.** The department has identified various costs determined to be ineligible for reimbursement. Section 101.143, Stats., lists specific cost items which may not be reimbursable under the PECFA program. In order to control costs and provide awards for the most cost-effective remediations of petroleum-contaminated sites within the scope of this chapter, the following costs may not be reimbursed:

(a) Costs determined to be unrelated to remedial action activities under the scope of this chapter:

13. Other costs that the department determines to be associated with, but not integral to, the remediation of a petroleum product discharge from a petroleum product storage system or home oil tank system.

PROPOSED CONCLUSIONS OF LAW

1. The appellants are owners or agents of a property covered by the remedial provisions of §101.143, *Wis. Stats.*
2. That part of the department's decision denying the appellant's request for reimbursement under the PECFA program in the amount of \$2,663.60 was correct, within the meaning of section 101.143(4)(b)15 of the Wisconsin Statutes and related administrative code provisions.
3. The department has a right to recover from a claimant under the PECFA program those funds which have been improperly paid or paid for costs which were not eligible and such recovery may be by offset against reimbursement to which the claimant is otherwise entitled. *Kathleen Rick*, at page 2, (Claim #53012-1968-35, Hearing No. 96-152). In seeking to recoup funds erroneously reimbursed to the claimant, where administrative proceedings involving the claimant are pending, the department is not limited to requesting the Wisconsin Attorney General to commence a court action for recovery under section ILHR, 47.14, *Wis. Adm. Code.*

PROPOSED DECISION

The respondent department's decision dated June 14, 1996 determining the reimbursement to the appellants as a result of this PECFA claim is modified to conform with the foregoing findings and conclusions and, as modified, is reversed, in part, and affirmed, in part, and remanded to the department for further proceedings consistent with this proposed decision and the proposed opinion, below.

Dated: November 15, 1999

STATE HEARING OFFICER

Robert C. Junceau
Administrative Law Judge

PROPOSED OPINION

I.

Summarized, the salient facts are as follows: In 1993, McKeefrey Trucking hauled the contaminated soil excavated from appellants' gas station, Bob's Stadium Citgo, to a temporary site in Appleton, where Clean Soils, Inc., thermally treated it. In 1994, Schenian Trucking hauled the thermally treated soil to a third site for disposal because the appellants did not need it for backfill at the Citgo site, having filled the excavation with new tanks.

The initial question is whether appellants' payment of invoice #4487 from Steve Schenian Trucking is a reimbursable PECFA cost.

The appellants contend that the costs associated with *treatment and disposal* of contaminated soil includes hauling it to a cleaning facility *and* disposal thereafter at a suitable location. Furthermore, since the department policy is to reimburse the cost of transporting treated soil for use as backfill at the cleanup excavation site, it argues that it is no less logical an interpretation to reimburse the cost to transport it to a third site for disposal, particularly where this is *less costly* than hauling it back to the excavation site for use as backfill.

The department maintains the law authorizes it to pay only the costs to get the soil clean, and not costs incurred thereafter.

Whether the cost of disposal of the thermally treated soil is reimbursable must be determined under PECFA law. In this case, the fact that the Wisconsin Department of Natural Resources approved of its disposal at a third site is not material to that determination.

The literal language of Wisconsin Administrative Code section ILHR 47.30(1)(c)4 is that PECFA eligible costs include those associated with the disposal of *contaminated* soils. By implication, this excludes *treated* soils. However, by policy determination, the department does reimburse costs of returning the treated soils to fill the excavation from which it was originally removed to be cleaned. This happens in the overwhelming majority of cases. Notwithstanding this rule, then, the department policy does allow limited deviation from the rule's literal language. Furthermore, the department concedes it may be more costly to pay costs for using the treated soil as backfill at the excavation from which it was removed than it does to transport it for disposal at a third site, as was the case here.

The department reimburses for transporting treated soil to be used as backfill at a cleanup excavated site under the auspices of section ILHR 47.30(2)(a)13, as a cost not merely associated with but *integral to the remediation*. This is a reasonable interpretation because such use avoids leaving a large hole at the remediated site.

In contrast, the appellants, by their own choice, removed the soil permanently, not merely as act of remediation, but as part of a broader scheme to renovate their gas station. They chose to dispose of the soil rather than use it as backfill at the cleanup site due to objectives above and beyond simple remediation.

Reading and harmonizing both subsections of the rule together -- ILHR 47.30(1)(c)4. and (2)(a)13 -- the department was reasonable in determining both (1) that the costs of final disposal

of the treated soil were not for hauling contaminated soil and, (2) that, although associated with the remediation, the cost was not *integral* to that remediation.

Under all these circumstances, the department reasonably concluded that this cost is not eligible for reimbursement.

II.

Having found that the cost of final soil disposal in this case was not reimbursable, the question turns to whether the department could administratively offset the amount that it initially reimbursed in error against PECFA amounts it otherwise owed to appellants without requesting the attorney general to take action under section ILHR 47.14, *Wis. Adm. Code*. The department initially allowed the Schenian Trucking costs, apparently based on a misreading of the invoice, in which the claim reviewer overlooked the fact that the soil was already treated before loaded and trucked.

The department "has a right to recover from a claimant under the PECFA program those funds which have been improperly paid or paid for costs which were not eligible." *Kathleen Rick*, at page 2, (Claim 953012-1968-35, Hearing No. 96-152). While appellants correctly point out that the facts regarding the offset differed somewhat from those here, the principle of the department's right of recovery is the same.

ILHR 47.14 empowers the department to request the attorney general to take action against an owner, operator or their agents or designees to recover any award or portion of an award resulting from a fraudulent claim or one that person does not otherwise meet the requirements under this chapter, or if an award is issued for ineligible costs under this section. The word "action" relates to a proceeding in a Wisconsin court. This provision **is** applicable where there are no ongoing administrative proceedings in which the department has jurisdiction over the claimant. This rule does not expressly or by implication limit the department's ability to offset errors discovered during administrative review of a claim against amounts which otherwise are owing to a claimant. Section ILHR 47.35 (5) states that "portions of an award under the scope of this chapter may be withheld until a decision or an appeal shall be finalized".